BRIEF IN SUPPORT OF PETITION FOR WRIT

The only OPINION OF THE COURT OF APPEALS is the Per Curiam filed December 9, 1944 (R.) and it sets forth the reasons given by the Court for dismissing the appeal for want of prosecution. This Per Curiam Opinion has no bearing upon the opinion of the District Court on the merits. (R. 25 Ct. of Ap.)

JURISDICTION. It is claimed that this Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

This case involves questions of substance relating to the application of the Federal Rules of Civil Procedure, especially Rule 75, which does not appear to have ever been construed by this Court. The erroneous application of some features of said Rule 75, has unlawfully deprived Petitioner of his right to maintain his appeal, and his right to have a review of his appeal on its merits.

This case involves the due, orderly and decorous administration of justice, as involved in the Appellate practice under said Rule 75 and seeks to obtain from this Court a construction of said Rule as a question of general importance in the public interest, in order to bring about uniformity of decision among Circuit Courts of Appeal regarding said Rule.

The Petition for Rehearing was denied on December 13, 1944, from which last order this appeal for a Writ of Certiorari is taken.

STATEMENT OF THE CASE. The general nature of the case has been stated in the Petition for Writ, which is hereby adopted and made a part of this brief.

ARGUMENT

Assignment of Error No. One

The Court of Appeals prejudicially erred in that said Court has rendered a decision in conflict with the decision of another Court of Appeals on the same matter of general importance in the public interest, namely the construction of Rule 75 of the Federal Rules of Civil Procedure.

Under favor of Rule 75 (c) the Special Committee appointed by the District Court moved the Court of Appeals for an order to SUBSTITUTE THE "TESTIMONY" in question and answer form for the narrative form originally filed by the Appellant. (R.)

Said motion was sustained, and a typewritten Transcript of all the "Testimony" in question and answer form was duly filed by the Appellant.

NO CLAIM WAS MADE in the subsequently filed MOTION OF THE SPECIAL COMMITTEE, that Appellant had not filed a transcript of ALL THE TESTIMONY. The claim was made, that Appellant had filed only a portion of the "RECORD".

By use of the word "RECORD", we claim the following was meant:

MIDDLETON VS. HARTFORD ACCIDENT, 119 Fed. (2) 721 (C. C. of Ap. 5th Circ. May 16, 1941)

> Head note 1. "Record, within federal rule referring to designation of portions of "record", proceedings and evidence to be contained in record on appeal, means writings filed with clerk as pleadings, process, formal orders of judge, and such other writings as have always been considered parts of record in law or equity case in district court. Fed. Rules of Civil Pro. Rule 75 (a)."

The said Motion also claimed that the Transcript of the Testimony filed by Appellant did not include the examination of the Special Committee and of the Appellant "UPON PROFESSIONAL STATEMENTS".

WE ASK THIS COURT TO CONSIDER WHETHER OR NOT "PROFESSIONAL STATEMENTS" ARE MEANT TO BE INCLUDED IN THE LANGUAGE OF RULE 75 (c) "TESTIMONY" OF WITNESSES.

We have quoted the language of Rule 75 (c) in our Petition for Writ, which is hereby adopted and made a part of this Brief.

We called the attention of the Court of Appeals in our Petition for Rehearing in which we prayed for Leave to

File a Supplemental Transcript, to the LEGAL DEFINITION OF THE WORD "TESTIMONY".

EDELSTEIN VS. U. S., 149 Fed. 636, 640.

> "The word 'testimony' or to 'testify' implies the usual preliminary qualifications of taking an oath to speak the truth. Such an implication is so reasonable and well understood among lawyers and legislators that we would do violence to common intelligence to impute to Congress any other intention in the legislation in question."

PATTERSON VS. STATE OF OHIO, 122 Ohio State 96, 98.

> "Testimony is a statement under oath in a legal proceeding; the evidence of a witness under oath or affirmation."

As to "professional statements," we call attention to a decision involving Federal Rule 75 (e) dated April 30, 1942.

ROYAL PETROLEUM CORP. VS. SMITH, 127 Fed. (2) 841. C. C. of Ap. Second Circuit.

> Head note #4. "Under procedural rule forbidding inclusion in record of matter not essential to decision of questions presented by appeal, colloquy of court and counsel was improperly included in record. (Fed. Rules 75 (e))

GENERAL AMERICAN TANK VS. GOEBEL, 80 Fed. (2) 849.

> Head note #7. "Stenographic reproduction of all argument in court would not be regarded as constituting any part of record on appeal which reviewing court must consider."

Conflict of Instant Case with Decisions of Other Courts of Appeal

HALL VS. GORDON et al., 119 Fed. (2) 463 U. S. Court of Appeals for Dist. of Col. May 1, 1941.

> p. 464 (1, 2) "In our view the Federal Rules of Civil Procedure governing the preparation of the record on appeal should be liberally construed so as to promote justice and relieve against undue hardship. The letter of the rule should be followed, except where undue hardship would result. In such cases the rules should be flexible rather than rigid. To apply the letter of Rule 75 (c) in this case would of course defeat the appeal, and in our view this should not be permitted to happen if, without undue hardship to either party, it can be avoided."

DEMPSEY VS. GUARANTY TRUST CO., 131 Fed. (2) 103, Cir. Court of Ap. Seventh Circ., Oct. 28, 1942.

> Head note #3. "The purpose of federal rule relating to supplementing of record on appeal was to provide a simple method of adding to record on appeal any matter properly a part thereof which had been omitted therefrom by error or accident and to permit such additions even after the record had been transmitted to the appellate court." "Federal Rules of Civil Procedure, Rule 75, 28 U.S.C.A. following 723c."

UNITED STATES EX REL REMPAS VS. SCHLOTFELDT, 123 Fed. (2) 109, C. C. of Ap. 7th Circ., Oct. 11, 1941.

> Head note #3. "The Federal Rules of Civil Procedure and the Rule of the Circuit Court of Appeals for the Seventh Circuit, were intended to expedite and simplify practice and procedure, and ample provision is made to relieve against hardship and excusable neglect." Fed. Rules of Civil Pro. Rules 73 (a,g), 75 (j).

PENCE VS. UNITED STATES, 121 Fed (2) 804. C. C. of Ap. 7th Cir., July 2, 1941.

Head note #1. "The failure of an appellant to comply with court rule pertaining to the inclusion of a statement of points in record is not 'jurisdictional' and does not neccessitate dismissal of appeal." Fed. Rules of Civ. Pro., Rule 75 (d).

Opinion of a District Judge

We note in Sonken vs. Atchison, 36 Fed. Sup. 909, District Court, W. D. Missouri, W. D., February 13, 1941, the following:

Head note #1. "Where appellant, who appeals from judgment of District Court, omits part of the evidence in designation of evidence for inclusion in record on appeal, the APPELLEE HAS DUTY to prepare and file such omitted parts, which may be filed in narrative form." Fed. Rules of Civil Pro., Rule 75.

IN RE HENDY, 2 Fed. Rules Decisions, p. 244, Dist. Court N. D. Calif., Jan. 20, 1942.

Head note #2. "Where appellee's request that appellant furnish a more complete record is unreasonable, appellate court, to protect appellants, may withhold or impose costs as circumstances of case may require." Fed. Rule 75 (e).

Assignment of Error No. Two

That the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit, the intent and scope of Rule 75 of the Federal Rules of Civil Procedure.

With all possible diligence at our command we have been unable to find any decision of this Court interpreting or applying Rule 75 of the Civil Rules. We therefore assert that this Court has never construed said Rule, and that the question is new, and that it is a matter of general importance in the public interest.

Assignment of Error No. Three

That the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, that it has denied Petitioner leave under Rule 75 to correct his Transcript of Testimony by filing a Supplemental Transcript, embodying the matters indicated by the Court of Appeals to be necessary.

As to the Per Curiam of December 9th, 1944

The only information which the Court of Appeals had before it when it wrote its per curiam and dismissed the appeal for want of prosecution, were the various motions and briefs in the Court of Appeals and the record from the District Court, and its order of October 17, 1944 granting the motion of the Special Committee for the Substitution of "TESTIMONY" in question and answer form, and providing that the appeal would be dismissed in case of default.

We refer to the court's errors in the order in which they appear in the per curiam, and the Court used the following language:

> No. 1. * * * it became necessary, on motion of the relator BAR ASSOCIATION COMMITTEE."

The Court should have observed from the printed record, briefs and motions in the Court of Appeals that no BAR ASSOCIATION committee was involved, but merely a Special Committee appointed by the District Judge.

> No. 2. "Appellant has failed to comply with the order."

The fact that the Special Committee stated in its Motion that appellant had failed to comply did not prove such assertion.

Appellant has filed a transcript of ALL THE "TESTIMONY" as he understood the order, and as he understood the meaning of the word "testimony". The second motion of the Committee was filed in the hope of getting rid of an appeal which was as unpopular to the Committee as it was

to this Petitioner. Appellant had filed as ordered, all of the original exhibits to the "Testimony".

If the Court, in consideration of the Special Committee's motion, had discovered that the word "Testimony" did not include "Professional Statements", the matter would easily have been remedied by an order to Supplement the Transcript of Testimony by including everything the Court desired, and of course such order would have been obeyed to the letter, for the matter is of the utmost importance to the Petitioner. An order dismissing the appeal for want of prosecution was out of all reason, and constituted the greatest injustice which the court could inflict on Petitioner.

> No. 3. "It should be commented, moreover, that the typewritten transcript filed by appellant bears no official certification or verification."

No claim was made by the Special Committee in any of its several motions and briefs in the Court of Appeals, that any official certification or verification was required by any statute or Rule. From the information conveyed in the several motions and briefs on file in the Court of Appeals, it must have learned that there had been no official stenographer appointed by the District Court under Rule 80.

Such a finding of the Court conflicts with the following decision of another Court of Appeals.

MIDDLETON VS. HARTFORD ACCIDENT, 119 Fed. (2) 721. Cir. Ct. of Ap., Fifth Cir., May 16, 1941.

> Head note #6. "A trial was not "stenographically reported" within federal rule governing record on appeal, and stenographer's certificate as to correctness of transcript would not authenticate it, unless he was appointed under the rule governing appointment of stenographers, or unless he was agreed on by the parties." Fed. Rules of Civ. Pro., Rules 75, 80 (a,b).

> No. 4. "This court has become convinced from the procedure of the appellant on this appeal, that he is not prosecuting his appeal in good faith upon a true and complete record of the proceedings below."

Nothing that could have been said was further from the truth than such finding. Even the Special Committee in its Motions and Briefs never even whispered such a thing, for it does violence to common sense, which is the basis of all law.

Would any lawyer who had practiced for forty years attempt to act in bad faith in a matter of such grave importance, if he was sane?

There was nothing before the Court which could justify such a finding, and the dismissal of the appeal was as erroneous as the findings which led up to it.

Assignment of Error No. Four

That the Court of Appeals has, in violation of Rule 75, dismissed the Appeal herein without any review on its merits, thereby causing a miscarriage of justice.

The Special Committee filed no Brief in Answer to the brief of appellant on the merits.

THE PALPABLE WRONGS AND THE ERRORS OF THE COURT APPEAR UPON THE FACE OF THE PER CURIAM AND THE JUDGMENT ORDER.

There was no failure on Petitioner's part to take every legal step to secure the review of the judgment which affected the validity of the appeal or which could justify the dismissal of the appeal.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision of the Court of Appeals of the Sixth Circuit, and setting aside the order dismissing this Petitioner's appeal, under findings this Court may make regarding same, and allowing said Court of Appeals to proceed with this appeal under the jurisdiction it first acquired thereof, in accordance with law.

Respectfully submitted,

GEORGE S. HAWKE,

Petitioner.